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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1524, Misc.

THE TIMES MIRROR COMPANY,

Petitioner,

vs.

DONALD RAY ANSELMI,

Respondent.

THE TIMES MIRROR COMPANY,

Petitioner,

vs.

RAYMOND B. WHITAKER,

Respondent.

Brief of Respondents in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Statement of the Case

Respondents clarify misleading portions of the Statement of the Case contained in the Petition for Writ of Certiorari. Petitioner The Times Mirror Company (hereinafter Times Mirror) has stated in the Petition that the District Court dismissed the action against Times Mirror on the ground, *inter alia*, that "applicable provisions of the First and Fifth Amendments to the United States Constitution, operative through the Fourteenth Amendment,

prevented the exercise of Wyoming jurisdiction under the facts of the case." (Brief of Petitioner, Page 6) In fact, however, the opinion of the District Court does not even mention the Fifth and Fourteenth Amendments, and only refers to the First Amendment when quoting from another case. (Brief of Petitioner, Pages A-26 and 27)[1] Even on that point, however, Judge Kerr made that reference in his discussion of the "regularly doing business" portion to the long-arm statute, and that section of his opinion was not the basis of the Tenth Circuit's reversal. His opinion, then, solely concerned itself with whether the facts that were presented fit the applicable Wyoming statutes.

Simply stated, the decision of District Court Judge Kerr was twofold: *first*, § 5-4.2(iii), W.S. 1957, (tortious injury resulting from an act in Wyoming) failed to confer jurisdiction because the single publication rule meant that the "act" in question was the single act of printing the newspaper in California; *second*, § 5-4.2(iv), W.S. 1957, (doing business in Wyoming) failed to confer jurisdiction because the involvement of Times Mirror within the state did not meet the standards of regularly doing business.

On appeal to the United States Court of Appeals for the Tenth Circuit, the Court affirmed Judge Kerr's decision under subsection (iv) of the long-arm statute, stating "for this is not a 'doing business' set of facts." (Petitioner's Brief, Page A-7) However, the Circuit Court reversed the District Court on jurisdiction under subsection (iii), holding that "the Los Angeles Times released a force which took effect in Wyoming and which with the other jurisdictional facts satisfies the minimum contact requirement". (Petitioner's Brief, Page A-22) In other words the Tenth Circuit ruled that the tortious activity occurred in Wyoming, causing injury in Wyoming, and that this was sufficient to place jurisdiction of this case in the District Court of Wyoming.

[1]Because the opinions by the District Court and by the Tenth Circuit have been printed in Petitioner's Brief, Respondents will cite to the opinions by referring to the appropriate page of Petitioner's Brief.

Reasons for Denying the Writ

This Court should not grant a writ of certiorari in this case for the following reasons:

1. The decision by the Tenth Circuit rests upon an interpretation of state law.
2. The decision by the Tenth Circuit does not raise the conflict among circuit courts claimed by Petitioner.
3. Granting certiorari would significantly delay this case.

I

The Decision by the Tenth Circuit Court of Appeals Concerned Interpretation of Two Areas of Wyoming Law: Whether the Actions of Times Mirror Constituted a Tortious Injury in Wyoming, and Whether Wyoming Has Adopted the Single Publication Rule. In So Doing the Court of Appeals Did Not Reach or Decide Any Question of Federal Law.

Petitioner Times Mirror argued to the circuit court that the Wyoming Long-Arm Statute did not confer jurisdiction over it by the United States District Court for the District of Wyoming. Although the entire long-arm statute is reproduced below,[2] the relevant portion of that statute, § 5-4.2(iii), W.S. 1957 as amended, provides for the exercise of personal jurisdiction over any person "causing tortious injury by an act or omission in this state". It was that section of the statute that was the subject of the decision below.

In deciding that personal jurisdiction was conferred, the court treated two areas of Wyoming law. First, the court held that subsection (iii) of the long-arm statute was applicable and controlling. (Petitioner's Brief, Page A-21) By sending the

[2]§ 5-4.2
(a) In addition to all other bases of jurisdiction otherwise authorized or provided by law, any court of this state may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's
(i) transacting any business in this state;
(ii) contracting to supply services or things in this state;
(iii) causing tortious injury by an act or omission in this state;
(iv) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct in this state or derives substantial revenue from goods consumed or services used in this state;
(v) having an interest in, using, or possessing real property in this state; or
(vi) contracting to insure any person, property, or risk located within this state at the time of contracting.
(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

defamatory statement into Wyoming, thereby causing injury to a Wyoming resident, the court reasoned that Times Mirror could be held to have caused tortious injury by an act in Wyoming. (Petitioner's Brief, Page A-7 and 21) Deciding this point of law rested solely on an interpretation of the applicability of the Wyoming statute to the facts of the case.

The second area of Wyoming law treated by the circuit court was the single publication rule. Earlier, Judge Kerr had reasoned in his district court opinion that the single publication rule had been adopted in Wyoming. (Petitioner's Brief, Page A-26) The circuit court reviewed state decisions and determined that it had not been adopted in Wyoming. (Petitioner's Brief, Page A-21) Moreover, the court held that the effects of the single publication rule were much more limited than those ascribed to the rule by Judge Kerr.[3] Here again, however, the circuit court was dealing with intrepretations of state law.

The petition should be denied, therefore, because the decision below is based upon the Tenth Circuit's interpretation of Wyoming law. There is no show-

[3]Judge Kerr interpreted the single publication rule to mean that the tort was complete in the state of printing, i.e. California, (Petitioner's Brief, Page A-26) Because subsection (iii) of the long-arm statute confers jurisdiction over a person "causing tortious injury by an action . . . in this state", he reasoned that the subsection was inapplicable "since the 'act' was committed in California, not in Wyoming . . ." (Id.) Disagreeing with his broad interpretation of the rule, the circuit court held that the rule was designed to prevent multiple suits, and had no bearing on the issue of personal jurisdiction. (Petitioner's Brief, Page A-21)

ing under Rule 19 by Times Mirror that the Tenth Circuit's interpretation is "in conflict with applicable state or territorial law", nor is there a showing that the court below "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision."[4]

II

The Decision by the Tenth Circuit Is Not In Conflict with Decisions in Other Circuit Courts as Claimed by Times Mirror. Not only is the Position of the Fifth Circuit Unclear at This Time, But, More Importantly, the Language Relied Upon by Times Mirror in the Tenth Circuit Decision is Dictum and In No Way Forms the Basis for Decision by that Court.

Petitioner Times Mirror claims that a clear conflict exists in the rules of decision announced by the Tenth Circuit in this case, and rules previously announced in the Fifth Circuit and, perhaps, in the Second Circuit. Upon examination, however, it can be shown that the conflict claimed by Times Mirror does not exist.

This Court has held that an exercise of personal jurisdiction must not violate rights of due process as guaranteed by the Fifth and Fourteenth Amendments. The constitutional test is met if the defendant has such "minimum contact with [the forum] such that the maintenance of the suit does not of-

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[4]Rule 19, Rules of the Supreme Court of the United States.

fend 'traditional notions of fair play and substantial justice'." (*International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Hanson v. Denckla*, 357 U.S. 235 (1958)) In *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957) this Court found that the requisite "minimum contacts" were met when a Texas insurance company solicited one insurance policy in California, and serviced that policy by sending notices and collecting premiums.

In testing the minimum contacts of defendant publishers in libel cases, the Fifth Circuit has stated that the First Amendment requires a greater showing of contacts than would be required in tort cases that do not raise First Amendment issues (*New York Times Co. v. Connor*, 365 F.2d 567, 572 (5th Cir. 1966)):

> First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity.

After that decision in 1966, however, the position of the Fifth Circuit has become less clear. One year after *Connor* the Fifth Circuit was presented with a libel case involving a magazine publisher rather than a newspaper publisher as in *Connor*. (*Curtis Publishing Company v. Golino*, 383 F.2d 586 (5th Cir. 1967)) In that case the Fifth Circuit retreated and held that national magazine publishers were more susceptible to personal jurisdiction than were national newspaper publishers. (*Curtis Publishing Company v. Golino*, supra at 590) Moreover, the

court in *Curtis Publishing* characterized the *Connor* test to be merely a relevant "factor" to be considered in the determination of due process:

> Rather, *Connor* indicates that first amendment considerations are a factor relevant to a determination of the jurisdictional question; and, the discussion of that factor in *Connor* must be viewed in its factual context.
>
> *Curtis Publishing Company v. Golino*, supra at 592

Since *Curtis Publishing* the Fifth Circuit dealt twice more with jurisdiction in libel cases, and both cases further confuse the statement in *Connor*. In 1971 the court decided the case of *Wolfson v. Houston Post Company*, 441 F.2d 735 (5th Cir. 1971), and in a *per curiam* decision the court cited *Connor* but did not mention First Amendment considerations at all. Then, in 1975 the court was presented its most recent libel case which involved the assertion of jurisdiction in Mississippi over the Associated Press based upon the publication on a news story that came over the AP wires in Mississippi. (*Edwards v. Associated Press*, 512 F.2d 258 (5th Cir. 1975)) In holding that Mississippi could assert jurisdiction under its long-arm statute, the court referred to its statement in *Connor*, and accorded that statement a status less fixed and clear than is claimed now by Petitioner Times Mirror. Whereas Times Mirror asserts that the statement in *Connor* is a "rule of decision" (Petitioner's Brief, Page 22) and a "holding" (Petitioner's Brief, Page 21), the

Fifth Circuit pointedly and explicitly stated otherwise:

> Appellee here insists that the "rule" of *Connor* requires the quashing of the service obtained on it. . . .*Connor* indicates not so much a rule as it expresses a cautionary note. When a court attempts to assess whether jurisdiction over a defendant is reasonable, First Amendment considerations are a significant factor to be weighed.
>
> —*Edwards v. Associated Press*, supra at 266

Times Mirror, thus, gives greater significance and stature to the *Connor* statement than does the Fifth Circuit. That court, as indicated above, characterizes *Connor* as expressing a "cautionary note" rather than formulating a "rule".

As to the Second Circuit, Times Mirror can only say that "perhaps" (Petitioner's Brief, Page 21) that Circuit is in accord with the Fifth Circuit, and that the position in that circuit is "unclear". (Petitioner's Brief, Page 23) The decision in question is *Buckley v. New York Post Corporation*, 373 F.2d 175 (2d Cir. 1967), and, if anything, that decision is mildly critical of the *Connor* decision (*Buckley v. New York Post Corporation*, supra at 182-184)

It is Respondents' position, therefore, that neither the Fifth nor the Second Circuit presents the clear rules of law ascribed to them by Times Mirror. But, even assuming that both of those circuits presented crystal clear and unambiguous rules on the First Amendment issue, it could not be said that the

opinion by the Tenth Circuit in this case presents a contrary holding.

In his opinion in this case Judge Doyle in *dictum* states:

> Later Fifth Circuit cases such as *Curtis Publishing Company v. Golino*, 383 F.2d 586, 588, 589 (5th Cir. 1967), suggest that the Fifth Circuit is not at this time adhering to the early rule calling for weighing heavily the fact that the case is a First Amendment one in deciding whether the contacts are adequate. To hold as did the Fifth Circuit that the First Amendment has to be thrown on the scales as an added impediment in media cases gives to the media an additional arrow which is not appropriate in a determination as to whether the contacts are legally sufficient to constitute due process.
>
> —Petitioner's Brief, Page A-19

But, immediately thereafter, the opinion states that if that factor *would be* weighed, the jurisdictional decision would be the same:

> But even if this element were to be placed on the scales, so to speak, at this time, there is a countervailing policy consideration that outweighs it. We refer to the extremely disadvantageous position that citizens of Wyoming would be placed in if we were to adopt the *Insull* approach. No matter what the extent of the defamation was by an out-of-state member of the media to a citizen of Wyoming, the latter would be remedyless within Wyoming and would be forced, as we have seen, to travel to the home of the newspaper in order to vindicate his reputation.
>
> —Petitioner's Brief, Pages A-19-20

The circuit court in this case clearly took into account the First Amendment contention of Petitioner and still ruled that the required minimum contacts were present. (Petitioner's Brief, Pages A-15, 18, 19 and 20) No decision was rendered that is in conflict with other circuit courts. If anything this decision simply placed on the scales an additional consideration, that is the position of the victims. Petitioner would have this court believe the Tenth Circuit refused to place on the scales that element which the circuit court ruled was clearly outweighed. How can they be outweighed if they were not even on the scales?

Accordingly, a review of the decisions in the Fifth, Second, and Tenth Circuits does not reveal a conflict in the applicable rules of decision in those circuits as claimed by Times Mirror. As for the Fifth Circuit, not only is the position of that Circuit unclear as a result of the decisions after *Connor*, but also the Court has itself pointed out that the *Connor* statement "indicates not so much a rule as it expresses a cautionary note". (*Edwards v. Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975)) As for the Second Circuit, it has taken a position that by the admission of Times Mirror is "unclear". As for the Tenth Circuit, the decision in this case only contains *dictum* that discusses *Connor;* it does not establish a holding, nor does it rest any part of its

decision on a point at variance with *Connor*. Postulating a conflict among the circuits in this context is an act arising from imagination and fantasy, rather than an act arising from fact.

III

If this Court Grants the Writ of Certiorari, the Case Will Be Prejudicially Delayed.

The newspaper story that gives rise to this litigation was printed July 5, 1974. Respondent Whitaker filed his case June 10, 1975 and Respondent Anselmi followed on June 20, 1975. As of this date Times Mirror has still not filed an answer to either complaint. All discovery has been stayed. For almost two full years Times Mirror has held the litigation to a virtual standstill with its jurisdictional contentions. If this court grants certiorari, the proceedings will be stayed throughout that period, and discovery and further preparation of the case will be precluded. The practical effect of granting certiorari would be to delay the trial of the case for several more years. The discretion of this Court should be exercised to deny the writ, and allow the case to progress through trial. Not only will the rights of Times Mirror be preserved, but this case can progress at a rate to avoid further prejudice to Respondents' rights. (*Denver v. New York Trust Co.*, 229 U.S. 123 (1913); *Ohio Ex Rel Seney v. Swift & Company*, 260 U.S. 146 (1922))

Conclusion

The petition for writ of certiorari should be denied. The decision by the Tenth Circuit is simply an interpretation of Wyoming state law and does not present a ruling in conflict with the rule of law announced in any other circuit. The case should be allowed, at long last, to proceed to its merits.

Dated: May 27, 1977.

Respectfully submitted,

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